A **MURUGAN SUPPARAMANIAM**

v.

TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ORS

B FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
GOPAL SRI RAM FCJ
MOHD GHAZALI YUSOFF FCJ
[CRIMINAL APPEAL NO: 05-126-2009(B)]
C 21 JANUARY 2010

PREVENTIVE DETENTION: *Detention - Whether lawful - Habeas corpus - Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Whether s. 6(2) of Ordinance not complied*
D *with - Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 6(1), (2) - Federal Constitution, art. 151*

CRIMINAL PROCEDURE: *Habeas corpus - Emergency (Public Order and Prevention of Crime) Ordinance 1969, detention under - Whether*
E *s. 6(2) of Ordinance not complied with - Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 6(1), (2) - Federal Constitution, art. 151*

CONSTITUTIONAL LAW: *Fundamental liberties - Preventive detention - Whether lawful - Habeas corpus - Detention under Emergency*
F *(Public Order and Prevention of Crime) Ordinance 1969 - Whether s. 6(2) of Ordinance not complied with - Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 6(1), (2) - Federal Constitution, art. 151*

G The appellant detenu in the present appeal was detained pursuant to an order of the Deputy Minister of Home Affairs made under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('Ordinance'). He then made representations which were considered and dealt with by the Advisory Board ('Board')
H pursuant to art. 151 of the Federal Constitution read with s. 6(1) of the Ordinance. The complaint here was that s. 6(2) of the Ordinance was not complied with, thereby rendering the appellant's detention unlawful.

I

Held (allowing the appeal, and directing the issue forthwith of *habeas corpus*)
Per Gopal Sri Ram FCJ delivering the judgment of the court:

(1) The first limb of s. 6(2) of the Ordinance imposes a duty on His Majesty, as a constitutional monarch, to address his mind to the recommendations of the Board. The burden of proving that His Majesty has in fact considered the Board's recommendations lies on the respondents. In the present instance, the respondents in purported proof of compliance with the first limb of s. 6(2) of the Ordinance offered two diametrically conflicting explanations. The first respondent in his affidavit dated 9 June 2009 said that His Majesty did in fact consider the Board's recommendations. However, this was contradicted by the Board's secretary who said that as at the date of her affidavit (12 August 2009) there had been no response from His Majesty, the irresistible inference being that His Majesty had yet to consider the Board's recommendations. In the face of this obvious conflict, the respondents and in particular the first respondent must be held not to have discharged the onus upon him. There was, therefore, no alternative but to order the appellant's immediate release. *SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors* (foll). (paras 4 & 5)

Bahasa Malaysia *Translation Of Headnotes*

Perayu/orang yang ditahan dalam rayuan semasa telah ditahan berikutan dengan suatu arahan Timbalan Menteri Dalam Negeri yang dibuat di bawah s. 4(1) Ordinan Darurat (Ketenteramaan Awam dan Mencegah Jenayah) 1969 ('Ordinan'). Beliau kemudiannya membuat representasi-representasi yang telah ditimbang dan diselesaikan oleh Lembaga Penasihat ('Lembaga') mengikut Perkara 151 Perlembagaan Persekutuan dibaca bersama dengan s. 6(1) Ordinan. Aduan di sini ialah bahawa s. 6(2) Ordinan tidak dipatuhi, oleh itu menyebabkan tahanan perayu salah di sisi-sisi undang.

Diputuskan (membenarkan rayuan, dan mengarahkan *habeas corpus* dikeluarkan)
Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah:

(1) Cabang pertama s. 6(2) Ordinan mengenakan sesuatu kewajipan atas Yang di-Pertuan Agong, sebagai raja berperlembagaan, untuk menimbangkan cadangan-cadangan Lembaga. Beban

membuktikan bahawa Yang di-Pertuan Agong telah sebenarnya menimbangkan cadangan-cadangan Lembaga terletak pada responden-responden. Dalam kes semasa, responden-responden sebagai bukti pematuhan dengan cabang pertama s. 6(2) Ordinan menawarkan dua penerangan yang bertentangan. Responden pertama di dalam afidavitnya bertarikh 9 Jun 2009 mengatakan bahawa Yang di-Pertuan Agong telah sebenarnya menimbangkan cadangan-cadangan Lembaga. Walau bagaimanapun, ini disangkal oleh setiausaha Lembaga yang mengatakan bahawa sehingga tarikh afidavitnya (12 Ogos 2009) tidak ada apa-apa jawapan dari Yang di-Pertuan Agong, membawa kepada inferens yang tidak dapat dipatahkan bahawa Yang di-Pertuan Agong belum lagi menimbangkan cadangan-cadangan Lembaga. Memandangkan konflik yang ketara ini, responden-responden dan khususnya responden pertama mesti didapati tidak melepaskan onus yang terletak padanya. Oleh yang demikian, tiada pilihan selain dari mengarahkan bahawa perayu dilepaskan dengan segera. *SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors* (diikuti).

Case(s) referred to:
SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors [2009] 6 CLJ 705 ***(foll)***

Legislation referred to:
Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 6(1), (2)
Federal Constitution, art. 151

For the appellant - Datuk Baljit Singh (Abd Shukor Ahmad with him); M/s Shukor Baljit Singh & Partners
For the respondents - Najib Zakaria; Legal Advisor

[Appeal from High Court, Shah Alam; Criminal Application No: MT5-44-48-2009]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram FCJ:

[1] We heard and allowed this appeal on 21 January 2010, directing the issue forthwith of *habeas corpus*. The reasons for our decision are now produced.

[2] The appellant detenu was detained pursuant to an order of the Deputy Minister of Home Affairs made under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the Ordinance"). The order is dated 30 April 2009. The appellant then made representations which were considered and dealt with by the Advisory Board pursuant to art. 151 of the Constitution read with s. 6(1) of the Ordinance. The complaint here is that s. 6(2) of the Ordinance was not complied with thereby rendering the appellant's detention unlawful. To properly appreciate the nature of the complaint is best that we reproduce s. 6 in full. This is what it says:

> (1) Whenever any person has made any representations under section 5(1) to an Advisory Board, the Advisory Board, shall within three months from the date on which such representations were received by the Advisory Board, or such longer period as the Yang di-Pertuan Agong may allow, consider such representations and make recommendations thereon to the Yang di-Pertuan Agong.
>
> (2) Upon considering the recommendations of the Advisory Board under this section the Yang di-Pertuan Agong may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister; and every decision of the Yang di-Pertuan Agong thereon shall, subject to the provisions of section 7, be final, and shall not be called into question in any Court.

[3] Section 6(2) is constructed in a bifurcated fashion. The first limb which states "Upon considering the recommendations of the Advisory Board" is imperative in terms. It imposes a duty on His Majesty, as a Constitutional Monarch, to address his mind to the recommendations of the Advisory Board. The second limb is permissive. It confers a discretion on His Majesty to give the Minister such directions as His Majesty shall think fit. And the exercise by His Majesty of the discretion vested in him by the second limb is put beyond judicial review. In our judgment the subsection in its imperative first limb provides an important procedural safeguard to detenus. For it provides for a procedural mechanism to further protect a detenu's rights.

[4] The burden of proving that the recommendations of the Advisory Board were in fact considered by His Majesty lies on the respondents. This flows from the settled principle that the burden of satisfying the court that a detention is in accordance with law lies on the detaining authority. Hence, in a preventive detention

A case where written law demands something to be done, the burden of proving that it was done lies on the detaining authority. Now, whether the recommendations were indeed considered by the Yang di-Pertuan Agong is an issue of fact that must be proved like any other fact by the person within whose sole and exclusive knowledge
B that fact resides.

[5] In the present instance the respondents in purported proof of the compliance of the first limb of s. 6(2) offered two diametrically conflicting explanations. The first respondent in para 14 of his
C affidavit dated 9 June 2009 says that His Majesty did in fact consider the Board's recommendations. However, this is contradicted by the Board's secretary who says that as at the date of her affidavit (dated 12 August 2009) there has been no response from His Majesty, the irresistible inference being that His Majesty is yet to
D consider the Board's recommendations. The principles governing the evaluation of affidavit evidence in a case of this sort have been set out by this court in *SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors* [2009] 6 CLJ 705 and we do not wish to repeat what was there said. Suffice to say that in the face of this
E obvious conflict the respondents and in particular the first respondent must be held not to have discharged the onus upon him. We were therefore left with no alternative but to order the appellant's immediate release.

F **[6]** Before concluding there is an observation we would make. Over a considerable period of time this court has had to issue *habeas corpus* solely on the ground that the affidavit evidence filed on behalf of the detaining authority is seriously defective or in material conflict with other affidavits filed in opposition to the
G detenu's application. The fault lies with those responsible for settling the affidavits in not ensuring that the facts have been properly ascertained. It is a matter of pure amazement that federal counsel in the Home Ministry are unconcerned with the contents of the evidence settled by them. If they find that there is indeed a
H conflict between witnesses whose written evidence they will seek to rely upon in support of the detention order it is their plain duty to advise accordingly. It is certainly not their function to file conflicting evidence and then to seek justification for the detention order. The sooner this type of indifference is addressed the sooner
I such cases as the present will end.